NO. [illegible]

In the Supreme Court of the United States

(OCTOBER TERM, 1931.)

NEW STATE ICE COMPANY,
a Corporation,
Appellant,

vs.

ERNEST A. LIEBMANN,
Appellee.

STATEMENT OF GROUNDS ON WHICH APPELLANT CONTENDS THIS COURT HAS JURISDICTION TO REVIEW ON APPEAL THE DECREE APPEALED FROM AS REQUIRED BY PARAGRAPH 1 OF RULE 12.

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NO. 463

In the Supreme Court of the United States

(OCTOBER TERM, 1931.)

NEW STATE ICE COMPANY,
a Corporation,
Appellant,

vs.

ERNEST A. LIEBMANN,
Appellee.

STATEMENT OF BASIS ON WHICH APPELLANT CONTENDS THIS COURT HAS JURISDICTION TO REVIEW, ON APEAL, THE JUDGMENT OR DECREE APEALED FROM AS REQUIRED BY PARAGRAPH 1 OF RULE 12.

The appellant herein, pursuant to Paragraph 1 of Rule 12 of this Court, files this, its statement showing the basis on which it contends that this Court has appellate jurisdiction to review on appeal the judgment or decree appealed from herein.

(1) The statute believed to sustain appellate jurisdiction is 28 U. S. C. A., Section 347 (b), (Judicial Code, Section 240, as amended by Act of February 13, 1925, 43 Stat. at L. 939, Chapter 229), which provides:

"Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case."

(2) The judgment or decree of the United States Circuit Court of Appeals, Tenth Circuit, appealed from, was entered August 27, 1931. (Unprinted Record 65). The opinion was filed on August 20, 1931, and appears in the Unprinted Record at pages 53 to 64, inclusive. The application for an appeal was presented and allowed on September 16, 1931. (Unprinted Record 71).

(3) The appeal herein is from a final judgment or decree of the United States Circuit Court of Appeals, Tenth Circuit, holding invalid, as being repugnant to the Constitution of the United States, the Act of the Legislature of the State of Oklahoma approved April 7, 1925 (Chapter 147, Session Laws of Oklahoma 1925), declaring the manufacture, sale and distribution of ice to be a public business and placing the same under the jurisdiction of the Corporation Commission, giving that Commission the power, upon a hearing, to issue a permit or license, providing for a license fee, and a penalty for the manufacture, sale and distribu-

tion of ice without securing a permit or license as provided for therein. The applicable provisions of this Act are set out in Marginal Note 1 of the opinion of the Circuit Court of Appeals. (Unprinted Record 54-55.)

The appellant complied with the provisions of said Act and obtained from said Commission a license or permit to manufacture, sell and distribute ice in Oklahoma City, Oklahoma, and was engaged in such business under said license or permit on March 31, 1930, the date of the commencement of this action in the District Court of the United States for the Western District of Oklahoma, and is now, and ever since has been, so engaged. On and prior to March 31, 1930, the appellee was preparing to engage in the manufacture, sale and distribution of ice in Oklahoma City without complying with said Act and in violation thereof. On March 31, 1930, the appellant herein commenced an action in the District Court of the United States for the Western District of Oklahoma against the appellee, seeking to enjoin him from engaging in the manufacture, sale and distribution of ice in said city without complying with said Act. The complaint of the appellant appears in the Unprinted Record here, pages 4 and 5. The appellant in its complaint alleged that said permit or license issued to it by said Commission for the manufacture and sale of ice under the provisions of said Act constitutes and is a franchise property right, that it had invested in the business of the manufac-

ture and sale of ice in said city under said license or permit a large amount of money; that the appellee had no right to engage in such business within said city without first having obtained a license or permit from said Commission so to do; that the manufacture, sale and distribution of ice by him in said city, without having obtained a license or permit from said Commission, will injuriously affect the business, revenues and properties of the appellant invested therein and deprive it of its property without due process of law.

The appellee, in his answer, admits that the appellant was engaged in the manufacture of ice in Oklahoma City under a license or permit issued to it by said Commission, but denies that such license or permit constitutes a franchise property right. He also admits that he is preparing to and will engage in the manufacture, sale and distribution of ice in Oklahoma City without complying with the terms and provisions of said Act, and avers that said Act is repugnant to the Constitution of the United States, and particularly Section 10, Artiele I, thereof, and the Fourteenth Amendment thereto. The answer of the appellee appears in the Unprinted Record here, pages 6 to 10, inclusive.

In paragraph 3 of said answer, the defendant states:

"Said defendant admits that said complainant is engaged in the manufacture of ice in Oklahoma City, Oklahoma, under a license or permit issued to it by

> the Corporation Commission of the State, but specifically denies that such license or permit constitutes a franchise property right." (Unprinted Record 6.)

and in paragraph 9 of his answer he states:

> "Defendant further states and avers that the complainant is not engaged in the sale and distribution of ice to the public in Oklahoma City, State of Oklahoma; that all ice sold and distributed to the consumers in said city is sold and distributed by the Oklahoma City Ice Company, a corporation, and that said complainant should not be permitted to maintain this suit." (Unprinted Record 9-10.)

In other words, the appellee admitted that the complainant was engaged in the manufacture of ice, but denied that it was engaged in the sale and distribution thereof. During the trial of this case in the trial court, the following stipulation was made:

> "It was then stipulated that the law as it is now upon the statute books had been generally acquiesced in by the industry from the date of its passage to the present time. and that the parties complainant were engaged in the manufacture and sale of ice in Oklahoma City under a permit issued by the Corporation Commission under the provisions of the Act in controversy."

From this stipulation and the admissions of the appellee in his answer, we assert that the appellant was engaged in the manufacture and sale of ice in Oklahoma City under a permit issued to it by the Corporation Commission under the terms and provisions of said Act.

The trial court held said Act unconstitutional and void.

The decree of the trial court appears in the Unprinted Record at page 21, from which we quote:

> "On June 24th, 1930, the court, on further and final consideration of the pleadings, the evidence introduced and stipulations made by the parties, finds the issues in favor of the defendant and against the complainant; that the Act of the Legislature of the State of Oklahoma, of April 7, 1925, being Chapter 147, Session Laws of Oklahoma 1925, is unconstitutional and void, and that the complaint of the complainant is without equity and should be dismissed with prejudice."

The memorandum opinion of the trial court appears in the Unprinted Record at pages 11 to 21.

(4) The appellant duly perfected an appeal from the judgment and decree of the District Court of the United States for the Western District of Oklahoma to the United States Circuit Court of Appeals, Tenth Circuit, and an opinion was filed in that Court on August 20, 1931, affirming the decree of the District Court. (Unprinted Record 53-54.) On August 27, 1931, a formal decree was entered in the Circuit Court of Appeals affirming the decree of the District Court. (Unprinted Record 65.)

The Southwest Utility Ice Company brought a similar suit in the District Court against the appellee here. The two cases were tried together, though not consolidated. (Unprinted Record 11.) Separate appeals were taken to the Circuit Court of Appeals and the appellant here was the appellant in Cause No. 406 of that Court and the South-

west Utility Ice Company was appellant in Cause No. 405. The two cases were argued and submitted together in the Circuit Court of Appeals and disposed of by that Court in a joint opinion, copy of which was filed in each case, and a formal decree of affirmance was entered in each case, and the appellant here, the appellant in Cause No. 406 in the Circuit Court of Appeals, has brought its case here, by appeal, for review.

The Circuit Court of Appeals, in the beginning of its opinion, said:

> "These suits involve the constitutionality of Chap. 147, Okla. S. L. 1925, the provisions of which are set forth in Marginal Note 1." (Unprinted Record 54.)

and later stated the question involved in these words:

> "These cases present the single question: Is the business of manufacturing and selling ice of such a character that it is subject to regulation to the extent of requiring a certificate of convenience and necessity before a person may engage in such business? Or, to put it another way, may the state prohibit one man from manufacturing ice on his own property and selling it to his neighbor at a price they mutually agree upon? The trial court answered these questions in the negative, and entered a decree dismissing the bills." (Unprinted Record 55-56.)

In concluding the opinion, the Circuit Court of Appeals used these words:

> "It is our conclusion that, while ice is an essential commodity, there is both potential and actual competition in such business sufficient to afford adequate protection to the public from arbitrary treatment and excessive prices. With such competition existing in the

business, we seriously doubt that the manufacture of ice is so affected with a public interest as to justify the fixing of prices at which the commodity shall be sold, and we hold that it is not so affected to the extent required to warrant the more serious invasion of the rights of the citizens by limiting the number of persons who may engage in such business in a given territory.

"The decree is affirmed with costs."

(5) The complainant in the trial court, the appellant here, relied upon the validity of said Act of the Legislature of the State of Oklahoma and sought injunctive relief against the defendant there, the appellee here, under said Act, and there was squarely drawn in question, in that Court, the validity of said Act on the ground of its being repugnant to the Constitution of the United States and that Court held said Act invalid as being repugnant to the Constitution of the United States. The validity of said Act was drawn in question in the Circuit Court of Appeals, and that Court held the Act invalid as being repugnant to the Constitution of the United States, and the appellant here has the right, at its election, to have the judgment and decree of that Court reviewed, by appeal, here, under the express provisions of 28 U. S. C. A., Section 347 (b), *supra*.

New York ex rel Bryant v. *Zimmerman*, 278 U. S. 63, 73 L. ed. 184.

Home Ins. Co. v. *Dick*, 281 U. S. 397, 74 L. ed. 926.

Hughes Federal Practice, Vol. 5, Secs. 3153 and 3154.

Cyclopedia of Federal Procedure, Vol. 5, Chap. 50, Sec. 2636.

Respectfully submitted,

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